

STATE OF NEW JERSEY  
DEPARTMENT OF LAW & PUBLIC  
SAFETY  
DIVISION ON CIVIL RIGHTS  
DCR DOCKET NO. EA02HB-67193

██████,	)	
	)	
Complainant,	)	
	)	
v.	)	Administrative Action
	)	FINDING OF PROBABLE CAUSE
Marshall Retail Group,	)	
	)	
Respondent.	)	

On November 20, 2018, ██████. (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR), alleging that Marshall Retail Group (Respondent), discriminated against her based on disability and failed to accommodate her disability in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the allegations of discrimination in their entirety. DCR's investigation found as follows.

### SUMMARY OF INVESTIGATION

Respondent is a retailer in the casino-resort and airport marketplace with over 160 stores. In February 2005, Respondent hired Complainant as a sales associate and promoted her to Manager in October 2006. Complainant worked in Atlantic City, New Jersey. Complainant was responsible for three stores inside the Tropicana Casino: Marshall Rousso, Sweet's Bath Delights, and AKA. On November 7, 2018, Complainant was discharged after she requested an extension of her medical leave.

In the verified complaint, Complainant alleged that she had a disability as defined by the LAD and commenced a medical leave on October 29, 2018, initially for about one week.<sup>1</sup> Complainant's disabilities included gastric pain, hypothyroidism, Gastroesophageal reflux disease, stress, epigastric pain, syncope, and fatigue. Complainant's doctor then requested a three-week extension from November 6, 2018 until November 29, 2018.<sup>2</sup> Respondent's Vice President of Human Resources, Peri Bluemer, told Complainant that they could not hold her position for three months or three weeks and that she had to resign. Complainant claimed Respondent failed to engage in an interactive process and denied her a reasonable accommodation for her disability. She also alleged that Respondent has a policy of granting a six-week leave of absence without pay, but it denied her any such leave.

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<sup>1</sup> Complainant had initially requested 60 hours of paid time off (PTO) for medical reasons from October 29, 2018 until November 8, 2018.

<sup>2</sup> DCR's review of notes from Complainant's doctor showed that the initial request for an extension was written with an erroneous return to work date of 1.29.2018 instead of 11.29.2018. The doctor corrected that request by letter dated November 7, 2018.

In its response to the complaint, Respondent denied that Complainant's disability played any part in its decision. It asserted that Complainant had no available time under the Federal Family and Medical Leave Act (FMLA) because she took off from December 8, 2017 until March 6, 2018 for medical reasons. Respondent's Position Statement said that Complainant was told that based on her position, she was not able to leave for an extended period and that they were unable to operate the business without someone filling Complainant's duties. Regarding its unpaid Leave of Absence policy, Respondent's Position Statement stated that it was subject to the discretion of the company and based upon business and operational needs. Respondent said it was unable to provide any additional time beyond that which Complainant was entitled to under the FMLA.

In an interview with DCR, Complainant stated that she was managing three stores at the time of her termination. Respondent originally hired Complainant to manage one store.<sup>3</sup> Complainant agreed that her FMLA time might have been exhausted as a result of time she took off from December 8, 2017 until March 6, 2018 for medical reasons. But she stated that other current employees could have covered her duties without causing an undue hardship. Complainant stated that [REDACTED], [REDACTED] and other supervisors were overseeing her stores when she was out from December 2017 until March 2018 and they had again filled in for her from October 29, 2018 until the day she requested an extension of leave on or around November 6, 2018. Complainant said Respondent did not hire anyone externally to replace her. Complainant further stated that she has personally covered for other managers who handled multiple stores while they were on leave. For example, Complainant covered for [REDACTED] while she was out on maternity leave for three months in 2018.

DCR reviewed Respondent's [REDACTED] Discipline Notice dated November 6, 2018. It stated in pertinent part:

[Complainant] was on PTO for the last 60 hours (over a week) and we received a dr note on 11/6/18 extending her leave by an additional three weeks. Due to the fact that she is not eligible for FMLA she is out of PTO and her recent takeover of three stores, we cannot give her over four weeks out. We offered her the opportunity to resign and reapply but she refused and said that we could terminate her. I told her that she could think about and call me in the morning. She told me that she would not change her mind. We cannot afford to not have a manager for 4 weeks in that store. I have not heard from her by noon my time 3pm her time, so we are terminating.

DCR also reviewed an audio recording of a conversation between Complainant and Bluemer. The conversation was as follows:

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<sup>3</sup> Complainant told DCR that she worked inside the Taj Mahal Casino for approximately 12 years managing one store, and in or around 2016 she was transferred to manage one store in the Tropicana Casino. In 2017, Respondent gave her a second store. Complainant claimed she was told it was a temporary responsibility until they found another manager but it became permanent without an increase in pay. In August 2018, she was assigned to oversee a third store because a manager was terminated along with other staff at that location.

**[Bluemmer]:** I have tough news. We are not able to accommodate those 12 weeks off. You do not have enough FMLA. You have used all your 12 weeks; you are not eligible and running three stores. I may be able to take this as a resignation. I wanted to make sure you heard it from me.

**[Complainant]:** We are not talking six more weeks, three more weeks until I finish my medication.

**[Bluemmer]:** You do not have enough PTO to cover it.

**[Complainant]:** All I'm asking is for a little time off even if it has to be unpaid and if I feel better before three weeks I'll be back.

**[Bluemmer]:** There is just no legal way to keep you on the payroll. It is a question that we can't keep your insurance going. When someone has exhausted all of their FMLA and personal leave there is no way to do this. I was going to give you the option to resign or we can terminate you when you don't show up to work tomorrow.

**[Complainant]:** I did not used LOA [leave of absence] before.

**[Bluemmer]:** Your FMLA was used up on March 1. You used your full 12 weeks. Right now, you are asking for additional 12 weeks. You are eligible for six weeks of personal leave but your doctor has said you cannot work until the 29 of next year.

**[Complainant]:** No, this month not next year. It's three weeks Ms. Peri. So, when I finish the prescriptions that they sent me, it's a couple of them. I do not understand why you saying all this time...No, there is a mistake; it's November 29 that I'm supposed to go back. I swear on my kids. They gave me medications that I cannot drive.<sup>4</sup>

**[Bluemmer]:** Here is the issue and regardless. So it's actually 11.29 and not 1.29 so that makes sense. I see they made a mistake...That is not the issue. The issue is not whether it is 3 weeks or 6 weeks or 12 weeks, we want information as to what your abilities are and what you can do for work because if you could not drive, that is not an acceptable reason off work.

**[Complainant]:** No, no, no, I'm so sorry, I'm not saying I can't drive to work, the medication that I am taking right now makes me dizzy. You can talk to my doctor if you want to. I am not asking to stay home for nothing. I love my job I just realized this. I have the note in my hand. She made a mistake.

**[Bluemmer]:** I understand that but you are still asking for additional time and we are unable to grant.

**[Complainant]:** What about my LOA, I do not care if I have to take it.

**[Bluemmer]:** But LOA is up to the store manager. I mean the DM [district manager] and RM [regional manager] and they are not granting you personal leave. It is not a guaranteed right, FMLA is a guaranteed right by the government. This is a benefit that we offer to people for once in a lifetime issue that they have and they are not willing to grant you that time off which is 100% their prerogative.... I'm going to tell you something, I'll be more than happy to call [REDACTED] but I'm telling you right now that I know they are not going to grant you additional three weeks for personal leave...I understand I am going to be very candid with you, if they tell me they are not willing to grant the three weeks, which I absolutely, 100 percent know

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<sup>4</sup> According to Complainant, she was taking medication to help her control stress and anxiety. She said the side effects included drowsiness, diarrhea, insomnia, and tiredness and that is why she needed the extra time off.

that they are going to say, then we are back to the same arrangement. You either resign and you are resigning in good standing or we terminate you tomorrow.

Complainant told DCR that after the recorded conversation, Bluemer called her back and told her they could not grant her three weeks. Complainant said she asked her for two weeks instead to finish her medication but Bluemer rejected that request as well.

DCR interviewed Respondent's Vice President of Human Resources Peri Bluemer, who stated that a variety of people covered for Complainant starting on October 29, 2018, but [REDACTED] was the primary person. [REDACTED] was a brand-new store manager who covered four stores total inside the Tropicana Casino while Complainant was out on leave. Bluemer stated that Complainant's original doctor's note requested 10 weeks of additional leave. After speaking with Complainant, they realized she was asking for three weeks of additional leave, not 10. This meant she was requesting a total of approximately one month. At that time, Respondent had a new District Manager in place, [REDACTED], who had not worked in that region before. Bluemer stated Complainant had three stores in the Tropicana Casino and that two were suffering due to staffing issues. In addition, at that time [REDACTED] did not have an assistant store manager and Respondent had to transfer people from other stores. Bluemer said this was a huge hardship because it had an impact on its relationship with Tropicana, which could have eliminated stores on its sites.<sup>5</sup> Bluemer said Senior Vice President of Operations, Mark Rimmner, made the decision, after speaking with [REDACTED] and Bluemer, to terminate Complainant because they could not have the stores without a manager. Bluemer stated that [REDACTED] was not prepared to take Complainant's stores without a long-term store manager overseeing her. Bluemer said they had to name [REDACTED] the store manager of the four stores immediately and they had to move [REDACTED] to Tropicana to watch over [REDACTED]. [REDACTED] had to come from New York to also watch over [REDACTED]. Bluemer stated that Respondent moved people all around the area and those positions became permanent. Bluemer also stated that Respondent was in a tough position when it shuffled a large handful of people to make sure they could cover the Tropicana stores.

Bluemer stated that to her knowledge no new outside store managers were hired; instead, Respondent did many premature promotions. As support, Bluemer stated that Respondent promoted [REDACTED] on November 12, 2018, from store manager of a single store to store manager of four stores. Bluemer said they had no alternative ways to accommodate Complainant's requested leave. They were only able to shuffle staff by giving them the opportunity to be permanent hires; they could not have promoted employees to run a store and then later demoted them to no longer be managers.

Bluemer denied Complainant ever told her that if she felt better in less than three weeks, she would come back sooner. However, as transcribed above, in the tape recording of the conversation between Complainant and Bluemer Complainant stated, "If I feel better in less than three weeks I'll be back."

DCR requested supplemental information from Respondent and questioned why the same employees who covered for Complainant's PTO leave of 60 hours starting on October 29, 2018

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<sup>5</sup> In 2018, Respondent discovered a theft ring present in one of its stores. A store manager and a District Manager were terminated and Complainant took over this store.

were not able to cover for three additional weeks until November 29, 2018. Respondent's Attorney, responded: "MRG [Respondent] had the new SM [store manager] and new DM [district manager] watch over the stores for that time which proved to be extremely difficult. The SM's own store was failing. MRG did not have a good solution and it presented a hardship but MRG wanted (Complainant) to take the PTO time so MRG did what they could for that period. The moves that MRG eventually made to cover (Complainant's) role involved permanent transfers and promotions for a number of individuals." DCR also asked Respondent if it would have accommodated Complainant with the three additional weeks if Complainant had available FMLA leave at the time in question. Respondent answered, "If (Complainant) had FMLA leave time available to her, MRG would have, of course, provided her with whatever FMLA leave time she was entitled to."

In response to the evidence presented by Respondent regarding its claim of undue hardship, Complainant told DCR that [REDACTED] was well prepared to cover all four stores. She stated that [REDACTED] had been with Respondent for seven years; two years as an assistant manager, and she was recently promoted to manager. Moreover, Complainant said that [REDACTED] was so well prepared that she is currently in charge of five stores. Complainant further asserted that moving around managers and staff when Respondent was short-staffed is and was very common, it had happened in the past and it was already happening shortly before she left. She stated the company was already undergoing the transition of upper management and was in the process of hiring new staff for the understaffed stores. In addition, Complainant said that Respondent accommodated [REDACTED] who also had multiple stores, with three months' maternity leave.

## ANALYSIS

At the conclusion of an investigation, the DCR Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2(a). "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." N.J.A.C. 13:4-10.2(b). If DCR determines that probable cause exists, then the complaint will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). However, if DCR finds there is no probable cause, then that determination is deemed to be a final agency order subject to review by the Appellate Division of the Superior Court of New Jersey. N.J.A.C. 13:4-10.2(e); R. 2:2-3(a)(2).

A finding of probable cause is not an adjudication on the merits. Instead, it is merely an initial "culling-out process" in which the Director makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." *Frank v. Ivy Club*, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 498 U.S. 1073. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." *Id.*

The LAD makes it unlawful to fire, refuse to hire, or otherwise discriminate in the "terms, conditions or privileges of employment" based on disability. N.J.S.A. 10:5-12(a). It also requires employers to make a "reasonable accommodation to the limitations of any employee or applicant who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business." See N.J.A.C. 13:13-2.5(b);

Potente v. County of Hudson, 187 N.J. 103, 110 (2006) (noting that New Jersey courts have “uniformly held that the [LAD] ... requires an employer to reasonably accommodate an employee’s disability”). Providing an employee time off from work for treatment of a medical condition is a form of reasonable accommodation. N.J.A.C. 13:13-2.5 (b)(1)(ii).

An accommodation is not required if an employer can demonstrate that it would impose an “undue hardship on its business.” N.J.A.C. 13:13-2.5(b)(3). In determining whether an accommodation would constitute an undue hardship, factors to be considered include (a) the overall size of the employer’s business with respect to the number of employees, number of types of facilities, and size of budget; (b) the type of the employer’s operations, including the composition and structure of the employer’s workforce; (c) the nature and cost of the accommodation needed; and (d) the extent to which the accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement. N.J.A.C. 13:13-2.5(b)(3). The burden of proving undue hardship is on the employer. N.J.A.C. 13:13-2.8; cf. Lasky v. Moorestown Twp., 425 N.J. Super. 530, 545 (App. Div. 2012), cert. denied, 212 N.J. 198 (2012) (“If a defendant’s response to a reasonable accommodation claim is that that accommodation would be unduly burdensome or an undue hardship, this defense is considered an affirmative defense and the defendant assumes the burden of proof on this issue”).

Here, DCR’s investigation found sufficient evidence to support a reasonable suspicion that Respondent discriminated against Complainant based on her disability. In this case, Complainant requested an additional three weeks medical leave for treatment after she had used 60 hours of PTO for medical reasons. Evidence showed that Respondent was aware of Complainant’s disability.<sup>6</sup> Respondent asserted that allowing Complainant to extend her medical leave for three additional weeks imposed an undue hardship because it had to shuffle multiple employees including the Regional and District Manager. Vice President of Human Resources Peri Bluemer said that at the time [REDACTED] did not have an assistant manager and that the company was already suffering staffing issues at its stores. Bluemer also stated that Respondent had to promote employees prematurely, i.e. promoting [REDACTED] from store manager of one store to store manager of four stores, and it could not just return those employees back to their prior positions.

Respondent has not sufficiently established that permitting Complainant three additional weeks of leave would have imposed an “undue hardship” on the operation of its business. See N.J.A.C. 13:13-2.5(b). The investigation found that Respondent has a past practice of providing coverage for store managers who are on leave, and that an individual manager has been used to cover management at multiple stores. Complainant herself has provided coverage for multiple stores in the past to address the absence of another manager. And in this case it appears that Respondent arranged for coverage of the stores using existing employees during the time period Complainant would have been on leave without hiring additional staff. Additionally,

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<sup>6</sup> Bluemer said they were never clear on Complainant’s disability or exactly what was wrong. She said if an employee had a broken leg, they could get them a chair or do something else to accommodate. When asked if she requested a more detailed medical note for Complainant, Bluemer said Complainant provided a medical certificate and her FMLA paperwork. Bluemer said she read the list of Complainant’s ailments and it included diarrhea, insomnia, hypothyroidism and pain. She said it was not something she could accommodate with, for example, a chair or another physical item. However, it is clear that the accommodation Complainant was requesting was a few additional weeks off to complete her medical treatment.

Respondent's assertion that it had to promote others prematurely to cover for her position is questioned by Complainant's own professional experience, as Respondent had given Complainant a second store to manage in 2017 and a third one in August 2018 without promoting her or raising her salary. In short, it is unclear why the arrangements made with existing staff to cover for Complainant following her termination could not have been put in place on a temporary basis to provide coverage for the additional three weeks of leave she needed.

Moreover, there is a question whether Respondent made a good faith effort to address Complainant's accommodation request. It appears Respondent was operating under an assumption that FMLA leave is the only job protection it could have provided Complainant. Bluemer, in the audio recording, told Complainant that there was "no legal way" to keep her on the payroll when she had exhausted all of her FMLA and personal leave time. However, even for employees who are not eligible for FMLA leave and do not have accrued time to use to cover an absence, a period of leave from work may be a reasonable accommodation for a disability, as long as it does not impose an undue hardship on Respondent's operations. N.J.A.C. 13:13-2.5 (b)(1)(ii). Rather than assessing Complainant's request under an undue hardship standard, Respondent told Complainant that providing leave beyond a FMLA entitlement was a "once in a lifetime issue."

At this threshold stage in the process, there is sufficient basis to warrant "proceed[ing] to the next step on the road to an adjudication on the merits." Frank, supra, 228 N.J. Super. at 56. Therefore, the Director finds probable cause to support Complainant's allegations of disability discrimination.



Rachel Wainer Apter, Director  
NJ Division on Civil Rights

Date: December 19, 2019